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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1991

WILLIAM P. BARR, ATTORNEY GENERAL
OF THE UNITED STATES, et al.,
Petitioners,

VS.

JENNY LISSETTE FLORES, et al.,
Respondents.

On Writ of Certiorari from the United States
Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE

UNITED STATES CATHOLIC CONFERENCE
LUTHERAN IMMIGRATION AND REFUGEE SERVICE
ESPERANZA PARA LOS NIÑOS
VALLEY RELIGIOUS TASK FORCE
IMMIGRANT/REFUGEE CHILDREN'S PROJECT
AMERICAN FRIENDS SERVICE COMMITTEE
JOVENES, INC.
EAST BAY SANCTUARY COVENANT
ON BEHALF OF RESPONDENTS

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I

INTERESTS OF AMICI

Amici curiae are religious and social service organizations that provide supportive services, including temporary shelter, placement and advocacy for immigrants and refugees. Some of the *amici* directly assist children of immigrants and refugees in obtaining release from detention by the Immigration and Naturalization Service (INS) by helping them search for extended

family members and by providing alternative foster care placements. In addition, *amici* also help the children by providing other essential services, including education, job training and physical and mental health care.

Amici submit this brief in support of respondents' contention that the INS may not, consistent with the Constitution, detain children when safe, effective and less restrictive alternatives are readily available. The INS contends that custodial detention of such children, who have not been found guilty of any wrongdoing, or even determined to be deportable, safeguards the children's welfare and ensure their appearance at deportation proceedings. *Amici* submit this brief to show this Court that alternatives to such custody are readily available that safeguard the children's welfare better than INS detention. If the Court of Appeals' decision below is not affirmed, well-established organizations that protect and provide for such children will be precluded from doing so by the INS regulations at issue, even though their services are superior to INS custody.

A. UNITED STATES CATHOLIC CONFERENCE.

All active Catholic Bishops in the United States are members of the United States Catholic Conference (USCC), a nonprofit corporation organized under the laws of the District of Columbia. The USCC advocates and promotes the pastoral teachings of the Bishops in education, family life, health care, social welfare, immigration, civil rights, communications, and the economy. The USCC frequently participates in INS proceedings in support of the rights of both documented and undocumented aliens.

The Migration and Refugee Services Department of the USCC has a specific children's service unit. The unit is licensed as a child-placing agency under the laws of New York and places unaccompanied refugee minors into twenty foster care programs located in twelve states. An unaccompanied minor is defined as a child traveling without a parent, close non-parental adult relative, or a legal guardian. The USCC has resettled several thousand unaccompanied minors in foster care during the past few years.

The Unaccompanied Refugee Minors program (the Program) coordinates matters pertaining to placement, whether scheduled for family reunification or alternative care situations. The Program arranges pre-arrival and arrival formalities, including orientation of prospective caretakers and other placement procedures required by federal, state and local authorities. The Program oversees the placing and caring for minors, and organizes training and technical assistance to enhance the professionalism of the program. In addition, the Program represents the USCC before federal agencies with jurisdiction over the well-being of refugee minors.

The Program ensures that placements meet current regulations and policies in accordance with acceptable child welfare practices. The Program also sees to the expeditious placement of minors and carries out notifications to confirm that this occurs. The Program coordinates issues affecting refugee minors and contributes to the USCC's expertise on matters relating to refugee and immigrant minors.

Based on its experience with the Program, the USCC strongly believes that there are release alternatives available for detained children who have no relatives to care for them, and for this reason joins this *amici* brief.

B. LUTHERAN IMMIGRATION AND REFUGEE SERVICE.

The Lutheran Immigration and Refugee Service (LIRS) is a cooperative agency of the Evangelical Lutheran Church in America, the Lutheran Church-Missouri Synod, and the Latvian Evangelical Lutheran Church in America.

LIRS has a nationally recognized reputation for excellence in its programs for refugee resettlement, licensed foster care for unaccompanied refugee minors and immigration services. LIRS employs a three-tiered partnership approach between the national office in New York, professionally staffed regional offices (which are usually part of Lutheran social service agencies), and private volunteer groups in local communities, to maximize the ability of

its community-based network to provide material and emotional support for newcomers.

LIRS programs currently include the following:

1. Under contract with the Department of State, the refugee resettlement program (26 regional offices), and the Unaccompanied Refugee Minor programs (URM) (22 regional offices);
2. The Joint Voluntary Agency in Hong Kong;
3. Under contract with the Department of Health and Human Services, the Matching Grant program (7 sites), and the Amerasian special initiative;
4. The First Asylum concerns a program which provides funding and technical assistance to over 40 local legal and social service projects, and receives exclusive funding from foundations and church bodies;
5. Representation in Washington in connection with the Lutheran Office for Governmental Affairs;
6. Immigration services which provide training, resources and expertise to all LIRS affiliates.

LIRS has previously participated in programs for the Community Relations Service/Department of Justice during the Cuban Haitian entrant programs and is currently providing foster care to Haitian unaccompanied minors. LIRS works through a national network with licensed professional child care expertise. Through the Lutheran social service agency system and constituent congregations, LIRS can provide services virtually anywhere in the United States.

LIRS has placed over 4,000 refugee minors in coordination with its affiliated social service agencies. These minors were cared for through foster care, group homes, and independent living programs.

LIRS currently has 22 programs in 19 states, each operating in accordance with accepted child welfare practices as well as all applicable laws. In addition, each affiliate receives not only

regular state or county accreditation reviews, but also quality assurance reviews by the national LIRS office.

The flexibility and adaptability of LIRS affiliates is well tested in numerous different populations. Based on its experience, LIRS strongly believes that there are wholesome release alternatives available for detained children that would serve the Government's interests and provide conditions much more beneficial for the children's welfare than continued detention. Accordingly, LIRS joins this *amici* brief.

C. ESPERANZA PARA LOS NIÑOS.

Esperanza Para Los Niños (Esperanza) is a non-profit agency that provides assistance to unaccompanied immigrant and refugee children detained by the INS in southern Arizona and California. Esperanza is a project of Proyecto San Pablo, an ecumenical social service agency serving the Hispanic community in Yuma, Arizona. Proyecto San Pablo is governed by a board made up of representatives from eight congregations of different faiths, and the agency receives support from local churches, private foundations and national religious denominations.

During 1991 alone, 141 children were released from INS detention in El Centro, California, and Yuma, Arizona, through the assistance of Esperanza. Approximately half of these children were reunited with family members in the United States located by Esperanza. For the other half, Esperanza located alternative housing arrangements in licensed group homes or shelters.

D. VALLEY RELIGIOUS TASK FORCE.

The Valley Religious Task Force on Central America (VRTFCA) is an inter-religious organization formed in 1981 to aid Central American refugees in the Phoenix area. Part of VRTFCA's ongoing work is helping Central American children detained by the INS in Arizona. Once the children are received from detention, they are reunited with family or friends in the United States as soon as possible. Children without relatives or friends in the United States are placed with foster families and continue to receive assistance in school registration, tutoring,

locating and working with *pro bono* attorneys, limited job searches, and other services as needed.

E. IMMIGRANT/REFUGEE CHILDREN'S PROJECT.

The Immigrant/Refugee Children's Project (the Project) began in 1985 in response to the incarceration of unaccompanied immigrant and refugee children by the INS. The Project supports a humane policy of expeditiously releasing children who are detained. To further this goal, the Project operates a shelter in Los Angeles that is licensed by the Department of Social Services. It also coordinates its services, including recruitment of foster families, with local religious organizations, such as Catholic Charities of Los Angeles and the Mission Brothers of Charity.

The Project strongly opposes current INS regulations limiting the release of unaccompanied children to parents, legal guardians and close relatives. Under these regulations the children now served by the Project would be detained by the INS rather than being released to its licensed group home.

F. AMERICAN FRIENDS SERVICE COMMITTEE.

The American Friends Service Committee (AFSC) is a Quaker organization that conducts programs of service, development, justice, and peace through its headquarters in Philadelphia, nine regional offices across the United States, and program operations in 30 countries overseas. AFSC has worked with and promoted the rights of immigrants and refugees regardless of race, nationality, creed or political affiliation for 75 years. AFSC monitors the actions of the Immigration and Naturalization Service at the Mexican border and documents official abuses against citizens and non-citizens, including children. AFSC programs throughout the United States also advocate respect for the legal and human rights of all people in this society. It objects to any loss of liberty when no crime has been committed and sees such detention as a violation of those rights.

G. JOVENES, INC.

Jovenes, Inc. (Jovenes) is a non profit organization in the Los Angeles area dedicated to helping homeless teenagers and young

adults, particularly, unaccompanied immigrant children. Jovenes provides education, job training and temporary shelter for these children. In addition, Jovenes evaluates the need of each youngster who comes to its Service Center and determines the best way to provide immediate and long term assistance to each one. By working with other public and private human services agencies, Jovenes is able to provide health care to the children, place them in school, enroll them in foster care homes, and even assist in relocating them — sometimes to their native countries — whenever it is appropriate.

Jovenes believes that undocumented, immigrant children should be provided the basic care and opportunities that are available to other children in our communities. Jovenes also believes that there are viable alternatives to the current INS regulations, which call for the detention of these children, and that these alternatives are better not only for the children, but for the welfare of society as a whole. These alternatives are currently in place, accessible, and, in most cases, can be obtained by a telephone call.

H. EAST BAY SANCTUARY COVENANT.

The East Bay Sanctuary Covenant (EBSC) was founded in 1982 to support refugees from El Salvador and Guatemala. EBSC provides services throughout California and much of south Texas. One of EBSC's activities is the Refugee Rights Program, which helps refugees who are fleeing from war-torn countries and who are held by the INS pending deportation proceedings. The Refugee Rights Program assists those refugees in proceedings before the INS with the goal of protecting them from deportation and possible death or persecution upon return to the country from which they fled. Refugees can use a toll-free telephone number to contact the EBSC while in detention anywhere in the country to request aid in their deportation proceedings. EBSC also provides legal representation and helps place unaccompanied children with new families.

II

SUMMARY OF ARGUMENT

Amici submit this brief in support of respondents' contention that the INS may not, consistent with the Constitution, detain children when safe, effective and less restrictive alternatives, such as those provided by *amici*, are readily available. These alternatives provide a range of non-institutional living arrangements that protect the physical and emotional well-being of children. INS detention, however, does not. *Amici* believe that INS detention has an enormous detrimental impact on the welfare of the children and society as a whole. The INS can easily use the various well-established programs offered by their organizations, and others like them, without assuming additional burdens or expenses, and with little, if any, risk that these children will not appear at their deportation hearings.

III

ARGUMENT

A. DETENTION OF CHILDREN BY THE INS IS UNNECESSARY AND DOES NOT PROTECT THEIR WELFARE.

The detention of any person in government custody, prior to a hearing, is a substantial infringement on the fundamental right to liberty protected by the Constitution. This deprivation of liberty is impermissible, absent a showing by the INS that detention is necessary to achieve a legitimate government purpose. This would be true, as a matter of constitutional law, regardless of whether the detainees were children or adults.

However, because the detainees in this case are children, their interests should be considered with special solicitude for their unique vulnerability and special needs. See *Eddings v. Oklahoma*, 455 U.S. 105, 115-16 (1982); *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J. concurring). Here, the INS regulations at issue call for the institutional confinement of children — children who have never committed a crime, who are not a risk to society, and who are themselves often victims of cruelty and

oppression in their native lands. These regulations are inhumane and largely detrimental to society as a whole.

The devastating effect of detention on the psychological and physical health of these children is not disputed. Confinement in an institutional setting such as an INS detention facility can impair children's physical and emotional development; diminish their sense of self-worth; place them at risk of physical harm by other detainees; and deprive them of contact with family and other sources of psychological and social support. Applicable standards for the treatment of juveniles in governmental custody recognize that children should always be placed in the least restrictive setting available, and permit detention only when no open type of placement is available that will ensure the minor's safety. See, e.g., U.S. Department of Justice, National Institute for Juvenile Justice and Delinquency Prevention, Law Enforcement Assistance Administration Standards on Adjudication 3.153; Department of Health and Human Services, Office of Refugee Resettlement, 52 Fed. Reg. 38,147 (1987); Institute of Judicial Administration, American Bar Association Juvenile Justice Standards 3.1, 5.7, 6.7 (1980).

Furthermore, the psychological damage to these children caused by their detention will bring about long-term detrimental effects to our society, since some of them will remain legally in this country after completing the deportation hearing process. See *Plyler v. Doe*, 457 U.S. 202, 207 & n. 4, *rehearing denied*, 458 U.S. 1131 (1982). These children can not lead productive lives in our society if they do not receive appropriate care, which encompasses adequate shelter and education. The large detention facilities in which these children are currently placed do not adequately provide for them. As shown herein, numerous well-established existing alternatives, however, do.

B. EXISTING AND ESTABLISHED PROGRAMS OFFER ACCESSIBLE, SAFE AND EFFECTIVE ALTERNATIVES TO DETENTION OF CHILDREN.

The INS justifies its restrictive release policy by stating that "concern for the welfare of the juvenile will not permit release to just any adult . . .", 53 Fed. Reg. 17,499 (1988). The INS's

release policy, however, is detrimental to the children, and is not rationally related to the stated interest of concern for the child's welfare.

The INS admits that it is not a child welfare agency, and that it lacks the expertise or resources to perform investigations of potential placements with non-relative caretakers. Although conceding its lack of expertise in child welfare, the INS still maintains that it can provide appropriate care for children within detention facilities, and refuses to release detained children to qualified persons and agencies who *do* have expertise in child welfare. The INS concludes, without factual support, that children cannot be safely released to anyone but parents or certain close relatives, and so the only alternative to the release of children to "just any adult" is to keep them safely imprisoned in detention facilities.

Unfortunately for the children, the INS's restrictive release policy ignores the numerous well-established, reputable programs operated by religious and social service agencies that provide a full range of quality foster care and services for these children, which are clearly preferable to the stark realities of INS detention. Therefore, detention is unnecessary, even for those children who have no available relatives.

Community-based foster care programs, some administered by *amici* organizations, answer the legitimate concerns the INS may have about releasing children from detention to unrelated adults. Their sponsorship by reputable religious or social service organizations, and their long-standing records of providing care for immigrant and refugee children, provide adequate assurances that the children will be safe and well-cared for and are not being released "to just any adult." These programs are designed to address all the children's needs, not only for food, clothing, and shelter but also for education, counseling, health care, recreation, assistance with locating relatives, and other support. Most importantly, these programs can provide care for children who have no family members available to care for them in a non-institutional setting, which is crucial to their well-being and continued growth.

1. Resettlement Programs.

Well-established programs for the resettlement of unaccompanied refugee minors (URMs) are administered by private agencies in conjunction with the federal government. See 45 C.F.R. Sections § 400.110, *et seq.* These existing programs can be readily adapted to serve children detained pending deportation hearings. For example, the programs administered by the LIRS and the USCC serve these children, and include a national network of foster family homes, group homes, and independent living arrangements for older minors, coordinated through affiliated local social service agencies. The LIRS, for example, has affiliates in 19 states. These URM programs have been in place for many years and have served thousands of refugee children under contract with the Department of State, Bureau for Refugee Programs, with funding by the Department of Health and Human Services, Office of Refugee Resettlement.

These programs regularly receive state and county accreditation reviews, as well as quality assurance reviews by the national offices of the sponsoring organizations. The programs have special expertise in providing culturally appropriate placements and programs, and in assisting children with family location and reunification. The size and national scope of these programs, and the agencies' expertise in working with children of many diverse cultural backgrounds who come from regions in conflict, ensure their ability to accommodate the needs of children awaiting deportation hearings.

A current example is the handling of Haitian unaccompanied minors who are being paroled into the United States pending pursuit of their asylum claims. Both LIRS and USCC are successfully placing these children into their URM programs under an agreement with the Community Relations Service of the Department of Justice. In addition to receiving professional children's services, Haitian minors receive *pro bono* legal assistance from local attorneys who help them through the asylum process and also counsel them about the availability of other immigration remedies.

The URM programs are accredited and licensed by the states in which they operate, and each child placed through an URM program receives the full range of services he or she needs. These programs provide quality childcare welfare services, monitoring and accountability that conform to standard child welfare guidelines. All placements are investigated and approved by child welfare authorities. Thus, the INS's fears that it would be obliged to perform home studies itself, or else the children would be released to irresponsible persons who might harm them, lack factual support.

2. Programs For Pre-Hearing Needs.

In addition to the existing network of URM programs, other programs address the needs of children who are detained while awaiting deportation hearings, such as programs run by *amici* Immigrant/Refugee Children's Project, Esperanza Para Los Niños, Valley Religious Task Force and Jovenes, Inc.

Since 1985, the Immigrant/Refugee Children's Project has worked with local religious and social service agencies to obtain the prompt release of detained children. In March 1990, the Project opened a children's shelter for immigrant and refugee children in the Los Angeles area. The shelter is a licensed group home providing transitional living to youth between the ages of 5 and 17. Project staff help these children reunite with family members in the United States, or in the child's home country if the minor wishes and is able to return. When children have no family or friends to take them in, the Project works to secure permanent placement with host families. The Project also provides other essential services, including *pro bono* legal assistance, in-house mental health services (individual sessions and group therapy), medical examinations, school placement, vocational counseling, and cultural and recreational opportunities. In addition, the children receive academic tutoring services and assistance in learning English.

The Children's Project also provides after-care services to all children who leave the shelter facility. These services include referrals to community services, family counseling, and assistance in dealing with various adjustment or acculturation difficulties

they may encounter. The project coordinates these services with local religious organizations, including Catholic Charities of Los Angeles and the Mission Brothers of Charity. If the restrictive INS release policies are allowed to be implemented, the children will not receive the benefits of these services.

Esperanza Para Los Niños is a non-profit social service agency supported by various religious organizations that assists detained children in locating extended family members and obtaining release into their care. The agency also assists children who have no available family in the United States by locating alternative housing and social services, such as shelters and licensed group homes. In 1991 alone, 141 children were released from detention through the assistance of Esperanza Para Los Niños in El Centro, California and Yuma, Arizona.

The Valley Religious Task Force has a long-standing program of helping detained children in Arizona locate relatives or finding foster placements for them, and helping them gain to school, health care, and other basic services. Jovenes provides similar services in the Los Angeles area.

These programs are specially developed by *amici* with the best interest of immigrant and refugee children in mind. *Amici's* programs permit the children to lead a fairly normal life while they await their immigration hearings. The children live in non-institutional settings, attend regular schools, assist church services, and are generally able to do the things that children their age are supposed to do. If the Court of Appeals decision is reversed, *amici* will no longer be able to provide their services to these children, because the INS will keep them detained.

3. Minimal Impact on INS Resources.

The INS will not incur any additional expenses by working with these organizations to place the children.¹ The programs

¹In fact, the INS will save money by allowing *amici* to place the children. URM programs, for example, have a very low per capita cost compared to other institutionalized settings. Estimated costs range from \$29 to \$35 per day, per child, not including medical reimbursement

offered by *amici* organizations are well established and easily accessible. *Amici* organizations work closely with legal groups who call them when children need their services. Most can be reached by telephone 24 hours a day by the children, the lawyers assisting them, or even by INS officials themselves.²

These organizations are willing and able to place these children in foster homes or other non-institutionalized settings. For example, Esperanza Para Los Niños has arranged to receive a list of all newly detained children everyday with detention centers that are located close to it. It then immediately sends people to the detention center to do legal intake to determine the needs of these children. INS resources are hardly utilized. There are many groups like *amici*; if the INS were to fully utilize them, the children could be spared the hardships of detention at a minimum cost to the INS.

4. Minimal Risk of Flight.

The INS also justifies its practice of detention by stating that it is necessary to ensure that the children appear at their deportation hearings. The INS, however, provides no facts supporting its alleged fear that the children will flee if released to organizations such as the ones discussed above. The INS's concern is not justified.

First, as mentioned above, these are reputable organizations with long-standing records of providing care for immigrant and refugee children. These organizations aim not to frustrate the INS's goal of implementing the immigration laws, but to assist

costs. This amount includes national and local office administrative costs, local affiliates' costs, case management expenses, foster family payments, clothing allowances, and other related costs. INS detention, however, costs up to \$100 per day, per child.

²For example, lawyers reach LIRS by calling its central office, which coordinates the placement of the child within its network of Unaccompanied Refugee Minor programs. The INS currently utilizes LIRS by working with the Department of Justice's Community Relations Services to place unaccompanied Haitian children. The USCC is similarly accessible.

the children through the established process. They will not jeopardize their ability to do so by breaking the laws.

Further, these organizations usually (if not always) provide *pro bono* legal representation. Lawyers promptly review the case of each child released to these organizations to establish what right the child has to remain in this country. The lawyers then represent the child *through* the process; they do not avoid the process by helping the child to flee. In fact, these organizations make every effort to ensure that the children will appear at their deportation hearings.

Finally, to reduce its fear that the children will not appear at the hearing, the INS can easily require that it remain informed of the location of each child at all times. Most *amici* organizations keep track of the children they place. To the extent that some, if any, do not, the INS could easily require that they do so as a condition of release of the children to them. Thus, if the children do not appear at a hearing, the INS could find them with very little effort.

Amici believe that the INS's fear that the children will not show up at their deportation hearing is unfounded. Children are not likely to run away if placed in a nurturing environment. However, any risk that they will not appear could be minimized if the INS is kept informed at all times of the location of each released child. *Amici* organizations can do so at minimal expense, given that tracking systems are most likely already in place. *Amici* believe that the price paid by the children, and society in general, if the children are *not* released, is immeasurable.

IV

CONCLUSION

It is undisputed that foster care for children in a non-institutionalized setting is considered far better, by all applicable child welfare standards, than incarceration in a detention facility. The INS cannot justify detaining children, where safe and effective alternatives are offered by *amici* religious and social service organizations and can easily be utilized by the INS. The cost of detention both to the children and to society is incalculable. Thus, *amici curiae* respectfully urge the Court to affirm the decision of the Court of Appeals.

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